United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2490

To be argued by
RICHARD WILE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2490

UNITED STATES OF AMERICA,
Appellee,

—v.—

STANLEY SPIRN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Stanley Spirn appeals from a judgment of conviction entered on November 7, 1974 in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 74 Cr. 705, filed on July 15, 1974, charged Spirn in one count with aiding and abetting an attempt to destroy property located within the United States and belonging to a foreign official in violation of Title 18, United States Code, Sections 970 and 2.*

* Indictment 74 Cr. 705 also named Victor Vancier as co-defendant. Vancier, who was less than eighteen years old on May 24, 1974, the date of the offense charged in Indictment 74 Cr. 705, elected to be proceeded against as a juvenile. On August 16, 1974, Information 74 Cr. 813 was filed against Vancier, and Judge Wyatt dismissed Indictment 74 Cr. 705 as to him. On November 11, 1974 Vancier was adjudicated a juvenile delinquent on this charge and was sentenced on December 6, 1974 to two months confinement under 18 U.S.C. § 5037(b).

Trial commenced on September 17, 1974 and concluded on September 23, 1974, when the jury returned a guilty verdict.

On November 7, 1974 Spirn was committed to the custody of the Attorney General for treatment and supervision pursuant to Title 18, United States Code, Section 5010(b), execution of which was suspended except for four months thereof, and Spirn was placed on probation for two years to commence upon his release from confinement. Spirn is free on bail pending appeal.

Statement of Facts

The Government's Case

At approximately 4:30 A.M. on May 24, 1974 New York City Police Officers Brian Abernethy and John Sullivan were on patrol in an unmarked car proceeding south on Lexington Avenue in Manhattan, in the vicinity of the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations ("Soviet Mission") (Tr. 10-11, 23, 39-40, 54).* At that time they noticed Spirn and Vancier sitting inside Spirn's Pontiac Tempest, which was parked on the east side of Lexington Avenue between 67th and 68th Streets (Tr. 11, 18, 23, 25, 40-41, 43, 56-57, 64-65, 73, 104). Their suspicions aroused, Abernethy and Sullivan drove around the block and parked on 68th Street, about thirty feet west of Lexington Avenue, from where they had a view of Spirn's automobile (Tr. 11-12, 25-28, 40, 54-56, 58-59). By that time Vancier was standing on the sidewalk and was engaged in conversation with Spirn, who was still behind the steering wheel of his car (Tr. 12-13, 28-29, 41-42, 56-57, 60, 73-74). Vancier walked north to 68th Street, looked up and down the street and returned to speak again with Spirn (Tr. 13-14).

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*"Tr." refers to the trial transcript. "GX" refers to Government's exhibit in evidence.

Vancier then picked up a green plastic gasoline can (GX 1) from the sidewalk, walked to a 1974 Plymouth Duster with New York license plates "595 DPL," which also was parked on Lexington Avenue, and poured gasoline (GX 2) on its roof and deck lid (Tr. 14-15, 17, 21, 31, 42-43, 45-46, 59, 74, 84-85). Simultaneously Spirn, still seated in his car, turned his head and looked in all directions (Tr. 16).

Abernethy and Sullivan then drove down to a point just in front of Spirn's car (Tr. 16, 31, 42). When Sullivan approached Spirn and asked what he was doing, Spirn said he had just "run out of gas" (Tr. 42, 64). After Sullivan placed him under arrest, Spirn said he was at the scene only because of difficulty with his car's battery (Tr. 43, 64). Spirn also claimed he did not know Vancier (Tr. 43).

Spirn and Vancier then were taken to the 19th Precinct station house on 67th Street between Lexington and Third Avenues (Tr. 18, 43-44). While at the station house Spirn was observed to be in possession of matches, while Vancier was not (Tr. 18, 44-45, 66-67). At the station house and within the hearing of Spirn, Vancier was questioned preliminarily to being released on a desk appearance ticket for a subsequent court appearance. Abernethy asked Vancier for the name of a person who could verify the personal information Vancier had provided; at that juncture Spirn volunteered that he would vouch for Vancier, that he had known Vancier for years and that Vancier lived on Utopia Parkway (Tr. 18-20, 68).

Spirn and Vancier were released on desk appearance tickets at about 7:30 A.M. (Tr. 20). Abernethy, having finished his tour of duty, left the station house shortly thereafter (*id.*). As he was standing waiting for a traffic light at the corner of Lexington Avenue and 67th Street, Abernethy saw Spirn driving his car, with Vancier as a passenger, south on Lexington Avenue (Tr. 20-21).

A record maintained by the United States Mission to the United Nations ("United States Mission") disclosed that New York license plates "595 DPL" had been issued on May 10, 1974 to Vladimir Yezhov of the Soviet Union for a 1974 two-door Plymouth coupe (GX 3); another such record disclosed that Vladimir Yezhov was an attaché with the Soviet Mission (GX 4; Tr. 89-96, 100).

On June 18, 1974 the Honorable Harold R. Tyler, Jr., United States District Judge, adjudged Spirn to be a juvenile delinquent on the basis of a finding that, on March 15, 1973, Spirn and a cohort threw beef blood on the face, head and raincoat of German Kosenkov, a Secretary of the second rank with the Soviet Mission, in violation of Title 18, United States Code, Section 112(a) (Tr. 104-05, 131-39).*

The Defense Case

Spirn offered no evidence.

ARGUMENT

POINT I

The Government's response to Spirn's request for disclosure of electronic surveillance was sufficient.

By pretrial motion Spirn requested disclosure of electronic surveillance of himself, Vancier, their attorneys, aides of their attorneys, other attorneys in "related cases," aides of those attorneys and premises owned, rented or used by such persons, by any federal agency, state agency, foreign

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* *United States* v. *Mitchell Rein and Zelig Spirn*, 74 Cr. 608 (S.D.N.Y.).

country or international organization. The motion, unsupported by affidavit from Spirn or his attorney, did not allege that Spirn, his attorney or anyone else had ever been the subject of electronic surveillance. On September 12, 1974 Assistant United States Attorney Richard Wile represented to Judge Wyatt in open court that no evidence resulting from electronic surveillance would be introduced at trial. Spirn does not now claim that any such evidence was introduced below.

Spirn now asserts that the Government's response was insufficient and that the Government should have been required to submit an affidavit affirming or denying such electronic surveillance.* This contention is frivolous. Having failed to allege that he or anyone else had been the subject of electronic surveillance, Spirn was not entitled to compel the Government to affirm or deny the existence of such surveillance. *See United States* v. *Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974); *United States* v. *See*, 505 F.2d 845, 855-56 (9th Cir. 1974); *United States* v. *Vielguth*, 502 F.2d 1257 (9th Cir. 1974); *In re Evans*, 452 F.2d 1239, 1247 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972); *United States* v. *D'Andrea*, 495 F.2d 1170, 1173-74 (3d Cir. 1974); *People* v. *Cruz*, 34 N.Y. 2d 362 (1974). *See also*, *Alderman* v. *United States*, 394 U.S. 165, 183 (1969); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939); *United States* v. *Maggadino*, 496 F.2d 455, 459-60 (2d Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973); *Beverly* v. *United States*, 468 F.2d 732, 752 (5th Cir. 1972). In any event, it is abundantly clear from the

* Spirn's brief is unclear as to whether it is claimed that the Government's affidavit should thereafter have been the subject of an evidentiary hearing. Since he failed to sustain his burden of coming forward with any facts reasonably supporting a conclusion that he or his counsel had been subjected to undisclosed electronic surveillance, neither an affidavit nor an evidentiary hearing was required.

record that the evidence of Spirn's participation in the crime charged derived exclusively from the alterness of Officers Abernethy and Sullivan on May 24, 1974.

POINT II

The Government's evidence was sufficient to establish that the Plymouth automobile specified in the indictment belonged to a "foreign official."

Spirn was convicted of aiding and abetting an attempt to destroy property belonging to a foreign official in violation of Title 18, United States Code, Sections 970 and 2. Section 970 reads in pertinent part:

> "(a) Whoever willfully . . . attempts to injure, damage or destroy, any property, real or personal, located within the United States and belonging to or utilized or occupied . . . by a foreign official . . . [commits a crime].
>
> "(b) For the purpose of this section 'foreign official' . . . shall have the same [meaning as that provided in section 1116(b) of this title]."

Section 1116(b) provides:

> "For the purpose of this section 'foreign official' means —
>
> "(1) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

> "(2) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee."

Spirn asserts that the Government's evidence was insufficient to establish that Vladimir Yezhov was (1) duly notified to the United States as an employee of the Soviet Union and (2) in the United States on official business at 4:30 A.M. on May 24, 1974. Of course, after conviction, the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Arroyo,* 494 F.2d 1316, 1317 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3208 (1974).

The evidence that Yezhov was duly notified to the United States as an attaché with the Soviet Mission consisted of GXs 3 and 4, records maintained by the United States Mission. GX 3, dated May 10, 1974, indicated that New York license plates "595 DPL" had been issued to "YEZHOV, Vladimir —USSR." Sol Kuttner, Adviser on International Affairs with the United States Mission, testified that records such as GX 3 are maintained on license plates actually issued by the New York State Department of Motor Vehicles on the basis of State Department certification that the recipient is entitled to diplomatic privileges and immunities. GX 4 is a letter from the State Department in the District of Columbia to the United States Mission stating that there was no objection to the inclusion of Vladimir Yezhov, an attaché with the Soviet Mission, in the diplomatic privileges and immunities list. Mr. Kuttner testified that upon receiving communications such as GX 4, the United States Mission publishes the name of the specified individual in that list and delivers diplomatic credentials to him.

Mr. Kuttner further testified that a grant of diplomatic privileges and immunities would occur after it had been requested by a foreign government and that request was forwarded to the United States Mission by the Chief of Protocol of the United Nations. Testimony as to practice and custom is properly received as circumstantial evidence that the practice was observed in a particular instance. *United States* v. *Delgado*, 459 F.2d 471, 472 (2d Cir. 1972); *United States* v. *Rossi*, 319 F.2d 701, 702 (2d Cir. 1963); *United States* v. *Oddo*, 314 F.2d 115, 117 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); I Wigmore, *Evidence* §§ 92-93 (3d ed. 1940). The evidence thus was amply sufficient to establish that Yezhov had been duly notified to the United States as an employee of the Soviet Union.

Spirn's second argument concerning the sufficiency of the Government's evidence as it related to Vladimir Yezhov is that Section 970 required proof beyond a reasonable doubt that Yezhov was physically present in the United States on official business at 4:30 A.M. on May 24, 1974. This argument was first made during the defense summation, at which time Judge Wyatt stated in response to an objection by the Government:

> "Yes. I don't think the law requires, at the time of the damage and injury of personal property, that the man be in the United States at that moment, and I instruct the jury that your argument on the law is wrong, as a matter of law.
>
> "If this man left his property in the United States after he had entered the United States on official business, and if, as you suggested, he went overnight to Canada, overnight to Cuba, and while he was gone, his personal property was damaged or injured, and the other essential elements of this offense were

shown, there would be a violation of this law. You are simply wrong as a matter of law" (Tr. 190-91).*

The question of statutory interpretation presented here is whether Section 970(b), in providing that the term "foreign official" has the same meaning as that provided in Section 1116(b), requires the Government to prove, as an element of the offense defined in Section 970(a), that the foreign official was physically present in the United States at the moment when the attempt to injure, damage or destroy his property occurred.

The Government contends that such proof is unnecessary. We submit that the phrase "who is in the United States on official business," as used in Section 1116(b)(2), was simply intended to exclude from the statute's protection foreign governmental officers and employees and their families who are present in the United States solely for personal reasons (*e.g.*, vacation, family visit, personal business). We further maintain that appellant's interpretation, if accepted, would be contrary to the broad remedial purpose which Congress sought to achieve in enacting this legislation, because it would create a substantial and anomalous gap in the protective scope and application of Section 970(a).

Section 1116 deals with homicides of foreign officials. As to those crimes, it is clear that the presence of the victim

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* Judge Wyatt's later instruction to the jury was that it must find that the Plymouth automobile "belonged to or was utilized by . . . a person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government and who is in the United States on official business" (Tr. 216-17). The jury would have been entitled to conclude that Yezhov was in the United States on official business at 4:30 A.M. on May 24, 1974 from the established facts that he was an attaché with the Soviet Mission and that his car was parked on Lexington Avenue at that time.

in the United States supplies the jurisdictional element. *See also* Title 18, United States Code, Section 112 (Supp. III, 1973), *amending* Title 18, United States Code, Section 112. However, jurisdiction under Section 970 is provided by the location in the United States of the property which is the subject of violence or attempted violence.

That the phrase "who is in the United States on official business" in Section 1116(b)(2) was intended only to exclude from the protection of Sections 112, 970 and 1116 those foreign governmental personnel present in the United States for personal reasons appears clearly from the legislative history. H.R. REP. No. 92-1268, 92d Cong., 2d Sess. 14-15 (1972) explained the provisions of Section 1116(b) as follows:

> "'Foreign official' as defined in subsection (b) embraces two distinct categories of persons. The first category, designated in subparagraph (1), includes . . . . These persons are protected while in the United States regardless of whether their presence relates to official or unofficial business. . . .
>
> "The second category, designated in subparagraph (2), includes all persons of foreign nationality who are duly notified to the United States as officers or employees of foreign governments or international organizations and who are in the United States on *official business* . . ." (italics in original).

Most importantly, however, acceptance of the construction of Section 970 urged by appellant would contravene the manifest legislative purpose which prompted the enactment of the Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, 86 Stat. 1070 (October 24, 1972) ("the Act"), and would create an unwarranted and significant gap in the Act's coverage. The Act, which included Sections 970 and 1116, originally was proposed jointly by the Departments of

State and Justice. In proposing the Act these two executive departments stated that the Act's purpose was to provide the Government with jurisdiction over domestic acts that interfered with the conduct of its foreign policy. Letter from William P. Rogers and John N. Mitchell to the Speaker, House of Representatives, August 5, 1971, H.R. REP. No. 92-1268, *supra* at 12-13 (1972); letter from William P. Rogers and John N. Mitchell to the Vice President, U.S. Senate, August 5, 1971, S. REP. No. 92-1105, 92d Cong., 2d Sess. (1972), 1972 *U.S. Code Cong. and Admin. News* 4316, 4322-23. The Senate Judiciary Committee recommended enactment because:

> "Acts of physical violence against members of the diplomatic corps and other foreign officials and official guests in our country are alarming and can pose a real threat to the free intercourse between the United States and other nations of the world.
>
> "During the period January through October, 1971, there were seventy-nine major documented incidents against foreign diplomatic, consular, and semi-official officers and personnel in the United States.
>
> "A review of existing criminal sanctions has disclosed that the Federal Government is currently without a criminal jurisdictional nexus over such matters.
>
> "Provisions for increased protection of diplomatic, consular and other foreign government personnel and their families would permit a direct discharge by the United States of its international obligations as a host country, whereas presently in most instances of interference with such persons, the Federal Government can only encourage local enforcement of the law" (S. REP. No. 92-1105, *supra* at 4317).

And in the "Statement of Findings and Declaration of Policy" accompanying the Act, Congress declared:

> "The Congress finds . . . that harassment, intimidation, obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States or against official guests of the United States adversely affect the foreign relations of the United States.
>
> "Accordingly, this legislation is intended to afford the United States jurisdiction concurrent with that of the several States to proceed against those who by such acts interfere with its conduct of foreign affairs."

In view of the clear determination by Congress that acts of violence directed at foreign officials and their property interfered with the conduct of United States foreign policy, it is impossible that Congress could have determined that such an act directed at property in the United States would not have a deleterious effect on foreign relations if fortuitously the victim foreign official temporarily left the United States. Section 970 must be construed to protect property in the United States belonging to foreign governmental personnel from the time they first enter the United States in connection with their official duties until they depart the United States for another assignment, if such persons and their property and the conduct of United States foreign policy are to be accorded the full scope of protection contemplated by the Act.*

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* The anomaly of appellant's interpretation of the statute may be illustrated by the following hypothetical. Suppose that a foreign official on assignment in the United States takes a vacation during which he travels to various parts of this country, but makes a brief stop in Canada or Mexico before returning to his post in New York. Appellant appears to contend that the property of the official in New York is not covered by Section

[Footnote continued on following page]

POINT III

The evidence established Spirn's participation in the crime, and Judge Wyatt's instruction to the jury on aiding and abetting was entirely correct.

The Government's evidence amply proved that Spirn was more than a mere spectator when the offense was committed. The proof at trial warranted findings by the jury that Spirn participated in the planning of the crime, that Spirn provided the transportation to the scene of the crime and that Spirn acted as a look-out during the actual commission of the crime.

First, the finding that Spirn participated in the planning of the crime was justified by the testimony that Spirn was engaged in conversation with Vancier immediately prior to Vancier pouring gasoline on Yezhov's Plymouth.

Second, the jury was entitled to conclude that Spirn provided the transportation to the scene of the crime for the purpose of having the crime committed from the facts that Spirn owned the Pontiac in which he and Vancier were sitting when first observed by Abernethy and Sullivan, that Spirn was sitting behind the steering wheel of his car and that the crime was committed at 4:30 A.M.

Third, the jury could have concluded properly that Spirn acted as a look-out while Vancier poured the gasoline from the testimony that Spirn was then turning his head in all directions, looking up and down Lexington Avenue.

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970 while he is traveling in the United States. Spirn further seems to argue that even if this property is protected while the official is traveling elsewhere in the United States, as soon as he steps over the border, that protection evaporates until he again sets foot in this country. It is patently absurd to suggest that the statute's broad remedial purpose would not be thwarted by this construction.

See United States v. *Pui Kan Lam*, 483 F.2d 1202, 1207-08 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

Finally, the jury was entitled to infer Spirn's consciousness of guilt and criminal intent from the facts that Spirn gave contradictory and false explanations for his presence at the scene of the crime, that Spirn falsely denied knowing Vancier and that, on a prior occasion, Spirn threw beef blood on the head of an official of the Soviet Mission.

Spirn's assertion that Judge Wyatt erred in not instructing the jury that mere presence coupled with guilty knowledge is insufficient to establish aiding and abetting is incomprehensible, since Judge Wyatt told the jury:

> "In order to find that a defendant aided or abetted another to commit the offense charged, you must find that the defendant in some way associated himself with the venture, that he participated in it as something he wished to bring about, that by his act or action, he endeavored to make it succeed. This participation by a defendant may be shown by any act designed to promote or further the crime, even of relatively slight importance, which you find was committed by the defendant. But to find a defendant guilty of aiding and abetting, you must find something more than mere knowledge that the crime was being committed, since a mere spectator at a crime is not a participant" (Tr. 218-19).

See United States v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir. 1974); *United States* v. *Terrell*, 474 F.2d 872, 875-76 (2d Cir. 1973); *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962).

POINT IV

Evidence of Spirn's prior assault on a Soviet official was properly introduced into evidence.

On June 1, 1974, in the United States District Court for the Southern District of New York, Spirn was adjudged a juvenile delinquent. In that proceeding Judge Tyler found beyond a reasonable doubt that on March 15, 1973 Spirn threw beef blood on the face, head and raincoat of German Kosenkov, a Secretary of the second rank with the Soviet Mission. Portions of the transcript of Judge Tyler's findings of facts were read to the jury in this case as evidence of Spirn's animus toward the Soviet Union, which provided a motive and the requisite intent for the commission of the offense.

Spirn asserts that Judge Tyler's findings were inadmissible because they were the result of a juvenile delinquency proceeding and because the prejudicial effect of such proof outweighed its probative value. Those assertions are without merit.

With respect to Spirn's first argument, Title 18, United States Code, Sections 5031-37, as in effect at the time Spirn was adjudicated a juvenile delinquent, did not provide for secrecy of the records of juvenile proceedings nor for the protection of the identity of the juvenile by the media. *Cf.* Title 18, United States Code, Section 5038, *added* Pub. L. No. 93-415, Title V, Section 508, 88 Stat. 1137 (September 7, 1974); New York Family Court Act, Section 783 (McKinney 1963).

Nor is there any logical reason why a juvenile delinquency adjudication should not be admissible subsequently as proof of the facts determined therein.* The doctrine

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* Proof of a similar act may be established by evidence of a judicial determination with respect to that act. *See Twentieth*

[Footnote continued on following page]

of collateral estoppel precludes a defendant in a criminal proceeding from denying matters determined against him at a prior criminal proceeding. *Pena-Cabanillas* v. *United States*, 394 F.2d 785, 786-88 (9th Cir. 1968). *See also Sealfon* v. *United States*, 332 U.S. 575 (1948); *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916) (Holmes, J.). The same result should obtain when the prior trial was a juvenile delinquency proceeding, since the standard of proof is the same as for a criminal proceeding. *In re Winship*, 397 U.S. 358 (1970).

Spirn's reliance on *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971), *Cotton* v. *United States*, 355 F.2d 480 (10th Cir. 1966), *Brown* v. *United States*, 338 F.2d 543, 545-48 (D.C. Cir. 1964) and *Thomas* v. *United States*, 121 F.2d 905, 907-09 (D.C. Cir. 1941) is misplaced. Those cases only support the proposition that the credibility of a witness may not be impeached by proof that he was previously adjudicated a juvenile delinquent. Here the findings concerning the prior offense were not used for impeachment purposes. They were employed solely to establish the facts underlying the adjudication, which were plainly relevant here.

The law in this Circuit is well established that "evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, Dkt. No. 74-1847 (2d Cir.,

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Century-Fox Film Corp. v. *Lardner*, 216 F.2d 844, 850 (9th Cir. 1954), *cert. denied*, 348 U.S. 944 (1955); Rule 803(22), Fed. R. Ev. (effective July 1, 1975). A certified copy of a transcript is admissible to prove the court's findings of facts at a prior trial. *See United States* v. *Vario*, 484 F.2d 1052, 1054 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *see also Anderson* v. *United States*, 417 U.S. 211, 220-21 n.11 (1974); *United States* v. *Kahn*, 472 F.2d 272, 284 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

January 10, 1975) slip op. 1231 at 1241. In balancing the probative force of Spirn's prior act against its possible prejudicial effect, Judge Wyatt was plainly correct in concluding that the scale tipped heavily in favor of admitting the evidence. Unquestionably the prior act was *similar* in character to the offense charged in that both involved prohibited conduct directed toward Soviet diplomatic personnel or property. The prior act was not remote in time, occurring a little more than one year before the offense for which Spirn was convicted here. Finally, proof of the prior crime was established by irrefutable evidence.

On this appeal Spirn's attack on the admission of the similar act evidence appears quite limited. He does not claim that any statement by Judge Tyler was prejudicial. Nor does he claim, as he could not, that Judge Wyatt failed to advise the jury of the limited purposes for which proof of Spirn's similar act had been admitted into evidence (Tr. 220). There is no contention that the Government argued an impermissible inference on the basis of the proof of the similar act.* Finally appellant does not claim that the Government was incorrect in contending, nor Judge Wyatt in concurring, that Spirn's prior assault on a Soviet official tended to establish that Spirn had a motive and the requisite intent for committing the crime in this case (Tr. 50).

The only specific claim of prejudice appears to be that Judge Tyler's findings were too lengthy. The argument is frivolous. The portion read to the jury comprises only eight pages of the trial record below which contained more than 160 pages of testimony and argument to the jury. In any event, since Spirn did not make an objection below to the reading of the transcript of Judge Tyler's findings on the ground that the length was prejudicial, and did not request Judge Wyatt to review the transcript, Spirn cannot

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* Indeed, in summation, Assistant United States Attorney Wile told the jury that neither Spirn's prior act nor the crime charged was calculated to cause personal injury (Tr. 206).

now press that contention. *United States* v. *Indiviglio*, 352 F.2d 276, 279 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).*

POINT V

Judge Wyatt responded properly to the jury's inquiries concerning character witnesses.

During its deliberations the jury sent a note to Judge Wyatt asking the following two questions:

> "Why did no character witness come forward? Is it customary?" (Tr. 242.)

Counsel for Spirn suggested that the response should be: ". . . there is no customary practice" (*id.*). Judge Wyatt then informed the jury:

> "Whether to offer evidence of reputation by character witnesses is a matter of choice for each defendant. Some defendants offer such evidence; others do not. There is no customary practice. In this instance the defendant elected not to offer such evidence" (*id.*).

Spirn argues unpersuasively that Judge Wyatt's additional instruction to the jury was prejudicial because it placed the burden of proof as to Spirn's character upon the defense.

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* Appellant's right to assert this claim is further subject to question because the Government offered to stipulate with Spirn concerning the relevant portions of the transcript. Spirn's attorney refused to enter into discussions toward that end. To avoid any claim that Judge Tyler's findings had been edited prejudicially, they were read, with immaterial exceptions, in their entirety (Tr. 125-26).

Judge Wyatt's response was accurate and responsive to the jury's two questions. Because the Government cannot offer evidence in its direct case as to the defendant's reputation, the decision whether or not to inject that issue into a case lies with the defendant. *See Michelson* v. *United States*, 335 U.S. 469, 475-76 (1948). Spirn did not call any character witnesses. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," *Bollenbach* v. *United States*, 326 U.S. 607, 612-13 (1946), which is precisely what Judge Wyatt did in this case.

Spirn's argument then reduces to the proposition that Judge Wyatt should have declined to respond to the jury's question why no character witness testified for Spirn because a response would improperly inject the issue of Spirn's character into the case and place the burden of proof on him. First, it is clear that to the extent the issue of Spirn's character entered the case, the issue arose out of the jury's deliberations, not Judge Wyatt's decision to eliminate the jury's confusion.

Second, in *United States* v. *Crisona*, 416 F.2d 107, 118 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), this Court rejected, in an analogous context, the contention that informing the jury that it could draw an inference against a defendant from his failure to call a witness infringed upon the defendant's right to rely on the Government's burden of proof. This case is even less compelling than *Crisona* for the acceptance of Spirn's position because the fair construction of Judge Wyatt's advice was that no inference should be drawn from Spirn's election not to call character witnesses. *See also United States* v. *Ploof*, 464 F.2d 116, 119 (2d Cir.), *cert. denied* as *Godin* v. *United States*, 409 U.S. 952 (1972).

Finally, the claim that the burden of proof was placed on Spirn flies in the face of Judge Wyatt's careful instructions on burden of proof, presumption of innocence and

reasonable doubt (Tr. 214-15), in light of which the supplemental instruction must be read. *United States* v. *Schiller*, 187 F.2d 572, 574 (2d Cir. 1951); 5 Orfield, *Criminal Procedure Under the Federal Rules* § 30.58 at 93-94 (1967).

POINT VI

Defense counsel is not entitled to compensation under the Criminal Justice Act for representing Spirn.

Section 3006A(a) of Title 18, United States Code provides:

> "Each United States District Court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony . . . ."

Article IV of the Plan of the Judges of the United States District Court for the Southern District of New York, Pursuant to the Criminal Justice Act of 1964, as Amended ("the Plan") provides in pertinent part:

> "B. In Proceedings Before a District Judge.
>
> "4. The District Judge shall designate and appoint from the panel of attorneys either an attorney employed by the Legal Aid Society or a private attorney. If the District Judge shall find that other counsel not on the panel of attorneys should be appointed, he may request the Chief Judge to add such counsel to the panel, stating briefly his reasons therefor, and the District Judge may appoint such counsel if such counsel is made a member of the panel of attorneys.

"5. Counsel shall be designated and appointed by the District Judge, and no person shall select his own counsel from the panel of attorneys or otherwise.

"C. Duration and Substitution of Appointments.

". . . If at any stage of the proceedings a District Judge . . . shall find that a person for whom counsel has not been appointed under this Plan is financially unable to pay counsel whom he has retained, the District Judge . . . may appoint the same counsel in the manner hereinabove provided. . . ."

The indictment was filed on July 15, 1974 and Spirn was arraigned on July 29, 1974. Defense counsel appeared with Spirn on that latter date and, having informed the Honorable Charles E. Stewart, Jr., United States District Judge, then presiding in Part I, that he was not admitted to practice in the United States District Court for the Southern District of New York, Mr. Persky received permission to represent Spirn at the arraignment. On August 13, 1974 Judge Wyatt admitted defense counsel to practice in the Southern District *pro hac vice*; no mention was made at that time of Spirn's alleged indigency. On September 12, 1974 Judge Wyatt denied the application to appoint defense counsel under the Criminal Justice Act on the grounds that a defendant who claims to be indigent does not have the right to select his attorney and that it was improper to appoint New Jersey attorneys under the Criminal Justice Act to serve in the Southern District of New York when they were not qualified members of the panel of attorneys (Transcript of pretrial conference, September 12, 1974, at 2-9). For Judge Wyatt to have granted the application to appoint defense counsel under the Criminal Justice Act would have permitted the flaunting of the provision of the Plan that "no person shall select his own counsel from the panel of attorneys or otherwise."

United States v. *Oddo*, 474 F.2d 978 (2d Cir. 1973) does not support defense counsel's application for compensation under the Criminal Justice Act. In that case this Court denied the application for compensation of an appointed attorney who had subcontracted appellate representation to a second attorney. *Oddo* does not require as a matter of law that a District Judge appoint as counsel for an indigent defendant an out-of-state lawyer, who is not even admitted to practice in the district where the case is to be tried, simply because a timely application under the Plan has been made.

CONCLUSION

The judgment of conviction should be affirmed and the denial of defense counsel's application for compensation under the Criminal Justice Act should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York,
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RICHARD WILE,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.

Form 280 A. -Affidavit of Service by Mail

Mr. Wile

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Patricia D. Burks being duly sworn deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 24th day of February, 1975 she served a copy of the within Brief on Appeal by placing the same in a properly postpaid franked envelope addressed:

Robert S. Persky, Esq.
40 Journal Square
Jersey City, New Jersey

And deponent further says that she sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

Patricia D. Burks

Sworn to me before this

24th day of February, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975